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*Seeking admission *pro hac vice*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

**CENTER FOR BIOLOGICAL
DIVERSITY**, a non-profit organization;

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR;
SALLY JEWELL, Secretary of the Interior;
U.S. FISH AND WILDLIFE SERVICE;
DAN ASHE, Director, U.S. Fish and Wildlife
Service;

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

ADMINISTRATIVE PROCEDURE ACT
CASE

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“the Center”) challenges the failure of Defendants U.S. Department of the Interior; Sally Jewell, Secretary of the Interior; U.S. Fish and Wildlife Service; and Dan Ashe, Director of the U.S. Fish and Wildlife Service (collectively, “FWS”) to comply with section 7 of the Endangered Species Act (“ESA”) and its implementing regulations, as well as section 706 of the Administrative Procedure Act (“APA”). Specifically,

1 FWS has failed to complete interagency consultation regarding the effects of three pesticides on
2 two endangered species in the California Bay Delta within the timelines required under the ESA
3 and its implementing regulations.

4 2. Interagency consultation is a central feature of the ESA's framework for
5 protecting endangered and threatened species. Through the consultation process, federal
6 agencies work with expert federal wildlife agencies, including FWS, to ensure that their actions
7 do not jeopardize the survival of threatened or endangered species.

8 3. As a result of previous litigation and a court-approved settlement, the
9 Environmental Protection Agency ("EPA") determined that dozens of registered pesticides are
10 likely to adversely affect listed species in the California Bay Delta and requested consultation
11 with FWS on the impacts of these pesticides. Three of these pesticides – atrazine, alachlor and
12 2,4-D – and two listed species – the Delta smelt and Alameda whipsnake – are at issue in this
13 Complaint.

14 4. Almost six years have passed since EPA attempted to initiate the first of these
15 consultations, and FWS has not completed a single consultation to ensure that pesticides will not
16 cause jeopardy to listed species in the California Bay Delta or adversely modify their habitats.
17 Through this ongoing delay, FWS has failed to comply with the ESA's strict time limits for
18 completion of the section 7(a)(2) consultation process. The agency's delay in completing the
19 required consultations allows toxic pesticides to continue to harm the species and contaminate
20 their habitats.

21 5. Through this Complaint, the Center seeks injunctive and declaratory relief,
22 including an order compelling FWS to complete the consultations and placing restrictions on
23 pesticide use to prevent jeopardy to the listed species until consultation is completed.

24 **JURISDICTION**

25 6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question
26 jurisdiction), 16 U.S.C. § 1540(g)(1)(A) (ESA citizen suit provision) and 5 U.S.C. § 702 (APA).

1 where they can observe the Alameda whipsnake and Delta smelt and will continue to maintain an
2 interest in these species and their habitats in the future.

3 12. The above-described interests of the Center and its members have been and are
4 being adversely affected by FWS's failure to complete consultation on the impacts of pesticides
5 on the Alameda whipsnake and Delta smelt. Once in the environment, pesticides impact listed
6 species through acute and chronic effects and contamination of habitats. If FWS completed
7 consultation as required, FWS would detail how the pesticides are affecting the Alameda
8 whipsnake and Delta smelt and their habitats and, if necessary, would suggest reasonable and
9 prudent alternatives to protect the species. 16 U.S.C. § 1536(a)(3).

10 13. Unless the requested relief is granted, the Center's interests will continue to be
11 adversely affected and injured by the agency's failure to complete the consultations, as well as
12 by the ongoing harm to the Alameda whipsnake and Delta smelt and their habitats as a result of
13 ongoing pesticide use. The injuries described above are actual, concrete injuries that are
14 presently suffered by the Center and its members and will continue to occur unless relief is
15 granted by this Court. These injuries are directly caused by the agency's failure to complete
16 consultations to ensure that EPA's pesticide registrations do not affect listed species. The relief
17 sought herein – an order compelling completion of consultation and placing restrictions on
18 pesticide use in habitats of the Alameda whipsnake and Delta smelt until the agency brings itself
19 into compliance with law – would redress the Center's injuries. The Center has no other
20 adequate remedy at law.

21 14. Defendant U.S. DEPARTMENT OF THE INTERIOR is a federal agency charged
22 with ESA consultation obligations.

23 15. Defendant SALLY JEWELL is the Secretary of the Interior. She is sued in her
24 official capacity. The Secretary is the federal official charged with ESA consultation. The
25 Secretary has delegated her duty to the U.S. Fish and Wildlife Service.

26 16. Defendant FWS is a federal agency within the Department of the Interior. Under
27 the ESA, FWS is responsible for consulting with federal agencies to ensure that agency actions
28

do not jeopardize the survival and recovery of the Alameda whipsnake and Delta smelt or adversely affect their critical habitats. 16 U.S.C. § 1536(a)(2).

17. Defendant DAN ASHE is the Director of FWS. He is sued in his official capacity as FWS Director.

LEGAL BACKGROUND

18. The ESA declares that endangered and threatened species are of “esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). Accordingly, the ESA establishes the “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “a program for the conservation of such endangered species and threatened species” *Id.* § 1531(b); *see id.* §§ 1531-1544.

19. The Secretaries of Commerce and Interior are charged with administering and enforcing the ESA, but they have delegated this responsibility to the National Marine Fisheries Service (“NMFS”) and FWS, respectively. 50 C.F.R. § 402.01(b).

20. Section 2(c) of the ESA provides that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act].” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.” *Id.* § 1532(3).

21. To fulfill the substantive purposes of the ESA, federal agencies are required under section 7(a)(2) to engage in consultation with FWS (and/or NMFS) before authorizing, funding, or engaging in any “action” that could “jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification of habitat of such species ... determined ... to be critical.” *Id.* § 1536(a)(2). Under the regulations jointly adopted by FWS and NMFS to govern Section 7 consultations, EPA’s ongoing oversight of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) constitutes agency “action” subject to

1 ESA section 7(a)(2). 50 C.F.R. §§ 402.02, 402.03; *see also Wash. Toxics Coal. v. Env'tl. Prot.*
 2 *Agency*, 413 F.3d 1024, 1033 (9th Cir. 2005).

3 22. A federal agency is relieved of the obligation to consult only if its action will have
 4 “no effect” on any listed species or designated critical habitat. 50 C.F.R. § 402.14(a)-(b). If an
 5 agency determines that its action “may affect” but is “not likely to adversely affect” a listed
 6 species or its critical habitat, the regulations permit “informal consultation,” during which FWS
 7 must concur in writing with the agency’s determination. *Id.* § 402.13(a). If the agency
 8 determines that its action is “likely to adversely affect” a listed species or critical habitat, or if
 9 FWS does not concur with the agency’s “not likely to adversely affect” determination, the
 10 agency must engage in “formal consultation,” as outlined in 50 C.F.R. § 402.14 (“Formal
 11 Consultation”). *Id.* § 402.14; *see also id.* § 402.02. Through consultation, FWS details how the
 12 agency action affects the listed species and their habitats and, if necessary, suggests reasonable
 13 and prudent alternatives to protect the species. 16 U.S.C. § 1536(b)(3).

14 23. The ESA requires that consultation occur at the earliest possible time and be
 15 conducted according to a strict timeline in order to ensure that the agency action is not causing
 16 jeopardy to listed species and their critical habitat, or otherwise harming the species. *See* 16
 17 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.46(c)(1). To that end, FWS and EPA are
 18 required to conclude consultations within 90 days. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. §§
 19 402.14(e), 402.46(c)(1).

20 **FACTUAL BACKGROUND**

21 **I. Pesticides Impact the Delta Smelt and Alameda Whipsnake**

22 **Delta Smelt**

23 24. The Delta smelt (*Hypomesus transpacificus*) is a tiny fish found only in
 24 California. It feeds on small, planktonic crustaceans, insect larvae, and copepods.

25 25. This once-abundant species’ population has crashed due to unsustainable water
 26 diversions and water transfers in the Bay Delta; ever increasing amounts of pesticides and other
 27 toxic pollutants; and the spread of nonnative species that thrive in the degraded Delta habitat.

1 Scientists have warned that the Delta smelt could go extinct within 20 years, and in 2013, the
 2 FWS recommended uplisting the Delta smelt from “threatened” to an “endangered” status.

3 26. The San Francisco Bay Delta has become polluted with often-lethal
 4 concentrations of herbicides and pesticides discharged and transported from California’s Central
 5 Valley into the fish’s estuary home. Toxic pulses of pesticides have been documented in the
 6 Delta during critical stages in fish development, and pesticides have been implicated in the
 7 recent collapse of the Delta smelt population. High levels of pesticides and other pollutants harm
 8 the Delta smelt both directly and indirectly by harming its invertebrate prey.

9 Alameda Whipsnake

10 27. The Alameda whipsnake (*Masticophis lateralis euryxanthus*) is a slender, semi-
 11 arboreal, diurnal snake with a broad head, large eyes, and slender neck. The whipsnake feeds
 12 primarily on lizards, and also on frogs, snakes, small birds, small mammals, and insects. It is
 13 found in the eastern San Francisco Bay area in areas of chaparral or coastal scrub vegetation that
 14 is interspersed with other native habitat types including annual grasslands, mixed evergreen
 15 forests, oak savannahs, oak woodlands, and riparian areas.

16 28. Rodenticides, herbicides, and other pesticides are used in and around designated
 17 critical habitat for the whipsnake and threaten the species both directly and indirectly — through
 18 prey reduction and habitat alteration. The 1994 proposed listing of the Alameda whipsnake
 19 identified pesticide exposure as a threat to the species, stating that pesticides have the potential to
 20 harm this species because “species in the food chain of the snake would be impacted.” 59 Fed.
 21 Reg. 5377, 5380 (Feb. 4, 1994). The draft recovery plan for the Alameda whipsnake includes
 22 reducing pesticide exposure through outreach and education to the public and pesticide
 23 applicators in particular as necessary recovery actions for the Alameda whipsnake.

24 **II. Atrazine, Alachlor, and 2,4-D Impact Endangered Wildlife**

25 Atrazine

26 29. Each year, approximately 60-80 million pounds of atrazine are used across the
 27 United States. As a result, atrazine is one of the most commonly detected pesticides in drinking
 28 water, surface waters, and ground water across the nation. Approximately 75 percent of stream

1 water and about 40 percent of all groundwater samples from agricultural areas tested in an
2 extensive U.S. Geological Survey study contained atrazine and its primary degradate,
3 deethylatrazine.

4 30. Such widespread environmental contamination is particularly alarming because
5 exposure to atrazine at levels as low as 0.1 parts per billion (ppb) have been shown to negatively
6 impact the development of sexual organs in amphibians. Research demonstrated that exposure to
7 21 ppb of atrazine during metamorphosis for as little as two days can impair development of the
8 reproductive organs in male and female frogs. Atrazine has also been shown to negatively
9 impact fish, reptiles, mammals, and birds.

10 **Alachlor**

11 31. Alachlor is a less-commonly used herbicide than atrazine, but even so,
12 approximately 4 million pounds were applied across the United States in 2011. The use of
13 alachlor has declined significantly since the early 1990s, when approximately 20-25 percent of
14 corn cropland was sprayed with this pesticide. Alachlor and its degradates are leachable from
15 agricultural soils and have been detected in watersheds of agricultural land, including ground and
16 surface waters.

17 32. EPA restricted the use of alachlor in 1998 due to significant environmental and
18 human health concerns. EPA currently classifies alachlor as a “likely” human carcinogen at high
19 doses and a “not likely” carcinogen at low doses. Alachlor is highly toxic to freshwater fish and
20 slightly toxic to birds and some invertebrates.

21 **2,4-D**

22 33. In 2014, approximately 45 million pounds of 2,4-D were applied, making 2,4-D
23 one of the most commonly used herbicides in the United States after glyphosate and atrazine.

24 34. The 2005 reregistration eligibility decision for 2,4-D acknowledges the significant
25 harms that 2,4-D can have on endangered species like the Delta smelt, concluding that the use of
26 2,4-D “exceed the acute risk level of concern (LOC) for freshwater fish and invertebrates and
27 chronic risk LOC for freshwater and estuarine fish and freshwater invertebrates.” In addition,
28 NMFS concluded that the use of 2,4-D jeopardized the continued existence of 28 Evolutionarily

1 Significant Units of endangered salmon and steelhead in the northwest United States and
 2 adversely modified the critical habitat of six of those species. EPA's risk assessment is deficient
 3 in that it does not mention reptiles like the Alameda whipsnake.

4 **III. FWS Fails to Complete Required Section 7 Consultation**

5 35. In 2007, the Center sued EPA for failing to consult with FWS regarding the
 6 pesticide impacts on 11 San Francisco Bay Area species with respect to 77 pesticide active
 7 ingredients. In 2010, the Center and EPA reached a settlement and the Federal Court entered a
 8 Stipulated Injunction requiring the EPA complete effects determinations for these 11 species and
 9 imposing spray-limitation buffers around defined habitats. In compliance with these settlements,
 10 EPA began to analyze the impacts of different pesticides on the listed species.

11 36. In February 2009, EPA requested formal consultation from FWS for atrazine,
 12 alachlor, and 2,4-D after determining that these pesticide were likely to adversely affect the Delta
 13 smelt and the Alameda whipsnake (as well the California red-legged frog, which is not covered
 14 by this Complaint). But FWS refused to complete formal consultation.

15 37. Nearly six years have passed since EPA requested the first of its consultations. In
 16 that time, FWS has not completed any consultation or recommended any measures necessary to
 17 ensure that atrazine, alachlor, and 2,4-D will not harm the Delta smelt or the Alameda
 18 whipsnake, or adversely modify their critical habitat. The process has been stalled for years
 19 despite the mandatory deadlines in the ESA and its applicable regulations. The agency's delay in
 20 completing the consultations and prescribing mitigation allows toxic pesticides to continue to
 21 harm wildlife species, in violation of law.

22 **FIRST CAUSE OF ACTION**

23 **FWS Has Failed to Complete Consultation within the ESA's Mandatory Timelines**

24 38. All allegations set forth above in this Complaint are incorporated herein by
 25 reference.

26 39. Under section 7(a)(2) of the ESA, EPA has a duty to ensure through consultation
 27 with FWS that its actions are not likely to "jeopardize the continued existence of any endangered
 28 species or threatened species or result in the destruction or adverse modification of [critical]

habitat” 16 U.S.C. § 1536(a)(2). Formal consultation is required for any pesticide that EPA determines “may affect” a listed species or critical habitat. *See* 50 C.F.R. § 402.14(a).

40. In 2009, EPA requested formal consultation from FWS for atrazine, alachlor, and 2,4-D after determining that these pesticides were likely to adversely affect the Alameda whipsnake and Delta smelt.

41. FWS did not consult with EPA and has not issued biological opinions to protect the Alameda whipsnake or Delta smelt from atrazine, alachlor, or 2,4-D.

42. Under the ESA and its implementing regulations, FWS must complete the consultation process within 90 days after consultation has been initiated by the action agency. 16 U.S.C. § 1536(b)(1); 50 C.F.R. §§ 402.14(e), 402.46(c)(1).

43. By failing to complete consultations within the ESA’s deadlines, FWS is in violation of the ESA. 16 U.S.C. § 1536; 50 C.F.R. §§ 402.14(e), 402.46(c)(1).

SECOND CAUSE OF ACTION

By Unreasonably Delaying Completion of Formal Consultation, FWS is Violating Section 706(1) of the APA

44. All allegations set forth above in this Complaint are incorporated herein by reference.

45. The APA dictates that agencies must conclude a matter presented to it “within a reasonable time.” 5 U.S.C. § 555(b). Accordingly, APA section 706(1) authorizes reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

46. In February of 2009, EPA requested consultations with FWS for atrazine, alachlor, and 2,4-D after determining that these pesticides were likely to adversely affect the Alameda whipsnake and Delta smelt. Despite the passage of approximately six years since EPA requested these consultations, FWS has not completed consultation for any of these pesticides. FWS’s delay in completing the consultations constitutes unlawful and unreasonable delay under APA section 706(1).

PRAYER FOR RELIEF

WHEREFORE, the Center prays that the Court:

1 (1) Declare that FWS is in violation of section 7 of the ESA, 16 U.S.C. § 1536, and
2 its implementing regulations, 50 C.F.R. §§ 402.14(e), 402.46(c)(1), by failing to timely complete
3 the consultations for atrazine, alachlor, and 2,4-D, which EPA determined were likely to
4 adversely affect the Alameda whipsnake and Delta smelt;

5 (2) Declare that FWS is in violation of Section 706(1) of the APA by failing to
6 complete the consultations within a reasonable time;

7 (3) Order FWS to complete the required consultations;

8 (4) Order restrictions on, or prohibit the use of, atrazine, alachlor, and 2,4-D where
9 they may affect the Alameda whipsnake and Delta smelt or their habitats until the consultation
10 processes have been completed;

11 (5) Award Plaintiff its attorneys' fees and costs in this action pursuant to 16 U.S.C. §
12 1540(g)(4) and 28 U.S.C. § 2412; and

13 (6) Grant such other and further relief as the Court deems just and proper.
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/s/ Justin Augustine

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